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Security Measures Abroad and Extraterritorial Human Rights Obligations[1]

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1 Introduction

International human rights law (IHRL) was initiated after the Second World War as part of public international law, which in turn had been based on the Westphalian concept of exclusive territorial sovereignty. As a result, IHRL has been informed by this territorial paradigm: A state is, first and foremost, obligated to respect, protect and fulfil human rights of those located *on its territory*. In light of today's globalization processes, the enormous social, political and economic transnational interdependence, and risks and opportunities entailed by new means of communication and technology, this approach creates a protection vacuum. Targeted killings by unmanned aerial vehicles (UAVs) or trans-border surveillance systems, as the paramount examples of security interventions of our time, reflect this: Today, states can violate human rights without having to set foot on the territory the victim resides on. Extraterritorial intelligence strategies that establish "legal black holes" are on the rise. Not only cyber-attacks and big data but also terrorism, climate change or global migration all introduce novel dimensions of security challenges and multiply the scope of individuals a state can and does affect – at home as well as abroad. The security-related measures states adopt in these domains often come into conflict with human rights. In which way does the foundational idea that state conduct is constrained by human rights also

1 This contribution forms part of a research project on "The Legal Philosophy of Extraterritorial Applications of Human Rights", funded by the Swiss National Science Foundation and led by Prof. Matthias Mahlmann at the University of Zurich. An earlier version was presented in a workshop during the IVR World Congress 2017 in Lisboa. The author thanks the participants for their valuable feedback.

pertain to these transnational, diagonal relations between states and "outsiders"[2]? This contribution intends to comment on the legitimacy of states' *extraterritorial human rights obligations* from the perspective of legal philosophy.[3]

Many scholars involved in the debate take the *general* legitimacy of extraterritorial obligations for granted (and rather focus on determining their exact scope or details of implementation). However, this is in tension with, first, political reality and the fact that some states (thus the duty-bearers at stake) still reject that IHRL puts them under any duties abroad – in general and/or in concrete cases.[4] Current tendencies to revert to concepts of nationalism, exclusion and sovereignty indicate that this opposition is unlikely to disappear anytime soon. Though new, transnational institutions may have divested the state of its unique significance, it still amounts to a central agent – especially when it comes to human rights protection.[5] Second, while many experts and interpretive bodies tend to allow for extensive extraterritorial application of IHRL,[6] the starting point of one of the most influential institutions in the field, the European Court of Human Rights (ECtHR), still seems to be one of territorial application, so that it is the *expansion* of duties beyond territory that is in need of justification – at least this is what its case law implies. Lastly, in normative theory, the general idea of universal human rights has been confronted with increasing revisionist criticism.

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2 The terms "outsiders" and "non-members" are used for denoting individuals who are not located on a state's territory, as opposed to "insiders", "residents", or "members".

3 "Extraterritoriality" refers to the application of norms outside a state's territory. The question here is whether IHRL norms, to which state A is bound, are to be applied vis-à-vis person X who is not located on A's territory. It is irrelevant where the *actions* of A take place on territory or not: The decisive criterion for extraterritoriality is the location of X, the addressee of the norm and the potential victim of violations, cf. Menno T. Kamminga, Extraterritoriality, in: *Max Planck Encyclopedia of Public International Law (MPEPIL)*, ed. by Rüdiger Wolfrum, 2012, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1040> [accessed 21.10.2017], chap. A1. Further, the focus on states does not imply that these are necessarily the only bearers of moral and legal human rights duties. Lastly, states often do not *de facto* turn a blind eye to the misery abroad, e. g. by providing development aid. But the problem arises when it is denied that they are *obliged* to do so, when it is viewed as supererogatory acts of charity rather than as a way of discharging stringent duties.

4 See e. g. CCPR, *Concluding Observations Israel*, CCPR/C/ISR/CO/4, 21.11.2014, § 5; CCPR, *Concluding Observations USA*, CCPR/C/USA/CO/4, 23.4.2014, § 4; *Submission of the United Kingdom*, Discussion on ICESCR Draft General Comment 24, 2017, <http://www.ohchr.org/Documents/HRBodies/CESCR/Discussions/2017/58-Government of the United Kingdom.pdf> [accessed 29.6.2018], 2; *Submission of Norway*, Discussion on ICESCR Draft General Comment 24, 2017, <http://www.ohchr.org/Documents/HRBodies/CESCR/Discussions/2017/Norway.pdf> [accessed 29.6.2018], 3 f. It is also domestic courts that deny extraterritorial reach, e. g. *Human Rights Watch Inc & Ors v. The Secretary of State for the Foreign & Commonwealth Office & Ors*, [2016] UKIPTrib15_165-CH, 16.5.2016, §§ 49 ff., 60 ff.

5 Cf. David P. Forsythe, *Human Rights in International Relations*, 4th edn, 2018, 250 f., 372, 390 ff.

6 Cf. e. g. IAComHR, *Coard et al. v. United States*, 10.951, 29.9.1999, OEA/Ser.L/V/II.106, Doc.6 rev. (1999), § 37; CCPR, *General Comment 31 (80)*, CCPR/C/21/Rev.1/Add.13, 26.5.2004, § 10; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, ICJ Reports 2004 (9.7.), 136, § 109; CAT, *General Comment 3*, CAT/C/GC/3, 13.12.2012, § 22; AfComHPR, *General Comment 3*, 18.11.2015, § 14.

The persistence of the territorial paradigm is significant when considering the manifold modern security measures that do not require any form of territorial authority: Can states escape human rights by sending UAVs or hacking e-mails from abroad? Moreover, it indicates research should still include foundational theoretical work on the general *normative justification* of extraterritorial obligations. To this aim, it is essential to systematically identify and address arguments on which a *territorial* view could be grounded. After a brief outline of an example from jurisprudence, this is what the present contribution aims to do. Thereby, it ultimately hopes to strengthen the normative foundation on which extraterritorial duties rest and to contribute to bridge the gap between political reality, scholarship and jurisprudence.

2 Illustrating the Legal Framework

The jurisprudence of the ECtHR provides the most extensive case law on the question of extraterritorial applicability, which is why it serves to illustrate the problem at hand. The European Convention on Human Rights (ECHR) holds that States Parties "shall secure to everyone *within their jurisdiction* the rights and freedoms (…) of this Convention".[7] In line with most other IHRL treaties, this makes the exercise of *jurisdiction* the central criterion for determining spatial applicability.[8]

In the landmark decision of *Banković* on NATO states' bombing of Belgrade in 1999, the ECtHR interpreted this threshold criterion restrictively: It denied applicability of the Convention to this extraterritorial case based on a *de iure* conception of state jurisdiction derived from public international law, where it denotes the *legal entitlement* to prescribe, enforce and adjudicate regulation.[9] Based on this understanding, the Court concluded that jurisdiction is inherently related to territory and that its extraterritorial exercise is limited to most extraordinary circumstances,[10] such as when a state "through the effective control of the relevant territory", established by occupation or home state consent, "exercises all or some of the public powers".[11] In addition, it emphasized the

7 Art. 1 *ECHR*, emphasis added.

8 E. g. Art. 1 *American Convention on Human Rights*; Art. 2(1) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; Art. 2(1) *Convention on the Rights of the Child*; Art. 3, 6, 14(1) *International Convention on the Elimination of All Forms of Racial Discrimination*. Famously, the *International Covenant on Civil and Political Rights* (ICCPR) refers in Art. 2(1) to "all individuals within its territory and subject to its jurisdiction". Today, it is widely agreed that this includes both people on territory and people under jurisdiction, cf. ICJ, *Wall Opinion* (Fn. 6), § 109; CCPR, *López Burgos v. Uruguay*, 52/1979, 29.7.1981, CCPR/C/13/D/52/1979, § 12.3.

9 ECtHR, *Banković and Others v. Belgium and Others (dec.) [GC]*, 52207/99, 12.12.2001, ECHR 2001-XII, §§ 55, 59 f. On jurisdiction in public international law, Kamminga (Fn. 3), §§ 1 f.

10 ECtHR, *Banković v. Belgium* (Fn. 9), § 61.

11 Ibid., § 71.

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"*espace juridique*"[12] and the essentially regional character of the ECHR, which "was not designed to be applied throughout the world, even in respect of the conduct of Contracting States".[13]

Arguably, the implication of *Banković* was that there is not necessarily a problem with violating ECHR rights of people abroad, as long as there is no substantial control exercised over the area they are located on – which is insightful with respect to modern interventions via airstrikes or UAVs. This is in tension with the object and purpose of the treaty, which "aims at securing the *universal* and effective recognition and observance of the Rights therein declared",[14] as well as with the principle to interpret IHRL in dynamic ways in order to make it effective in addressing contemporary challenges.[15] Most centrally, *de iure* jurisdiction is not an appropriate applicability threshold for human rights: The question of *whether it is lawful that a state's acts have effects abroad* (the question of *de iure* jurisdiction) is distinct from the question of *whether a state is bound by human rights when its acts have effects abroad* (regardless of how they came about). In IHRL, the question must be the latter, namely whether jurisdiction is *de facto* exercised.[16]

In the aftermath of *Banković*, the ECtHR has incrementally acknowledged a wider scope of applicability abroad by recognizing a *de facto* notion of jurisdiction, which can, moreover, also stem from personal authority a state agent exercises over an individual.[17] In the prominent case of *Al-Skeini*, it introduced a hybrid approach of both spatial and personal control, finding jurisdiction derived from *state agent authority* in a

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12 Ibid., § 80; ECtHR, *Cyprus v. Turkey [GC]*, 25781/94, 10.5.2001, ECHR 2001-IV, § 78.

13 ECtHR, *Banković v. Belgium* (Fn. 9), § 80.

14 Preamble *ECHR*, emphasis added.

15 ECtHR, *Banković v. Belgium* (Fn. 9), § 64. Moreover, *Banković* also implicitly rejected the previously used alternative model of jurisdiction as state agent authority exercised over an individual, used e. g. in EComHR, *Ramirez Sánchez v. France (dec.)*, 28780/95, 24.6.1996, DR 86-B, 155, 161 f.; EComHR, *Stocké v. Germany (dec.)*, 11755/85, 9.7.1987, Report of 12.10.1989, § 166; EComHR, *Cyprus v. Turkey (dec.)*, 6780/74, 6950/75, 26.5.1975, DR 2, 125, 136.

16 This is widely shared, see e. g. Walter Kälin / Jörg Künzli, *Universeller Menschenrechtsschutz*, 3rd edn, 2013, 146; Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, 2013, 26 ff., 198 f.; Michael Duttwiler, Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights, *NQHR* 30 (2012), 137–163, 140; CAT, *General Comment 2*, CAT/C/GC/2, 24.1.2008, § 7. Some authors explain the outcomes of *Banković* by the political environment shortly after the 9/11 terrorist attacks, in which the Court may just have feared the consequences of opening doors to people from all over the world to claim violations by ECHR states involved in the "War on Terror", see e. g. Marko Milanović, Extraterritoriality and Human Rights: Prospects and Challenges, in: *Human Rights and the Dark Side of Globalisation*, ed. by Thomas Gammeltoft-Hansen / Jens Vedsted-Hansen, 2016, 57; Mark Gibney, *International Human Rights Law: Returning to Universal Principles*, 2nd edn, 2016, 74 f.; Loukis Loucaides, Determining the Extra-Territorial Effect of the European Convention, *EHRLR* 4 (2006), 391–407, 400 f.

17 E. g. ECtHR, *Öcalan v. Turkey [GC]*, 46221/99, 12.5.2005, ECHR 2005-IV, § 91; ECtHR, *Issa and Others v. Turkey*, 31821/96, 16.11.2004, unreported, § 71; ECtHR, *Ilaşcu and Others v. Moldova and Russia [GC]*, 48787/99, 8.7.2004, ECHR 2004-VII, § 314.

situation in which a state exerted *at least some public powers* over the respective territory – even if located outside the *espace juridique* of the ECHR.[18]

However, while these later cases mirror a more generous approach, none of them has actually departed from the territorial paradigm. By emphasizing the significance of territorial authority (even if only instantiated through a *checkpoint*[19]) and by repeatedly confirming the essentially territorial nature of jurisdiction in almost all relevant cases,[20] the ECtHR upholds its "presumption against the extraterritorial application".[21] Its concept of jurisdiction appears symptomatic of the underlying territorial paradigm in IHRL. In what follows, one potential cluster of arguments behind such a paradigm will be critically discussed.[22]

3 The Objection from Sovereignty

Sovereignty describes the supreme authority to decide, set rules and be obeyed on a specific territory and over the population located therein. Rooted in the Westphalian system, it belongs to the main pillars upon which international law has been built.[23] While some early writers have conceptualized sovereignty as nearly absolute,[24] it is acknowledged that a contemporary notion is one that is constrained. It has long been accepted that the recognition of sovereign equality of other states curtails *external* sovereignty, motivated primarily by the idea of enabling co-existence: Sovereignty ends

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18 ECtHR, *Al-Skeini and Others v. the United Kingdom [GC]*, 55721/07, 7.7.2011, ECHR 2011, §§ 130 ff., 142, 149.

19 ECtHR, *Jaloud v. the Netherlands [GC]*, 47708/08, 20.11.2014, ECHR 2014, § 152.

20 E. g. ECtHR, *N. D. and N. T. v. Spain*, 8675/15, 8697/15, 3.10.2017, unreported, §§ 50 f.; ECtHR, *Jaloud v. the Netherlands* (Fn. 19), § 131; ECtHR, *Hirsi Jamaa and Others v. Italy [GC]*, 27765/09, 23.2.2012, ECHR 2012, §§ 71 f.; ECtHR, *Al-Skeini v. United Kingdom* (Fn. 18), §§ 131 f.

21 Nina Blum, *The European Convention on Human Rights beyond the Nation-State*, 2015, 2; Sigrun Skogly, Extraterritorial Obligations and the Obligation to Protect, in: *The Changing Nature of Territoriality in International Law,* ed. by Martin Kuijer / Wouter Werner, NYIL 47 (2016), 217–244, 243; Duttwiler (Fn. 16), 151 f.; Cedric Ryngaert, Clarifying the Extraterritorial Application of the European Convention on Human Rights, *Merkourios* 28 (2012), 57–60, 57 f.; Mark Gibney, Universal Duties: The Responsibility to Protect, the Duty to Prevent (Genocide) and Extraterritorial Human Rights Obligations, *Global Responsibility to Protect* 3 (2011), 123–151, 150.

22 Other theoretical frameworks in which arguments for a territorial view could be developed include theories of International Relations realism, particularism, patriotism, hierarchical nationalism and supremacism, social contract theories, or relativism.

23 Daniel Philpott, Sovereignty, in: *Stanford Encyclopedia of Philosophy*, ed. by Edward N. Zalta, Summer 2016 edn, <https://plato.stanford.edu/archives/sum2016/entries/sovereignty/> [accessed 7.4.2018], chap. 1; Christine Kaufmann, Elemente des Staates, in: *Staatsrecht*, ed. by Giovanni Biaggini / Thomas Gächter / Regina Kiener, 2nd edn, 2015, 12–21, 17; Anne Peters, Humanity as the A and Ω of Sovereignty, *EJIL* 20 (2009), 513–544, 515 ff.

24 Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth*, ed. by Julian Harold Franklin, 1992; Thomas Hobbes, *Hobbes's Leviathan*, 1952; Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*, 10th edn, 2015. Bodin and Hobbes accept some restraints to sovereignty stemming from divine or natural law but none from any human-made law.

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where sovereignty of others begins. What is distinct of more modern conceptions is the claim that *internal* sovereignty exhibits not only a factual component of enforcing authority but also a substantive normative one, requiring that it be enforced in legitimate ways: It comes with the responsibility for protecting residents' human rights.[25] At the same time, the Westpalian-inpired sovereignty principle still powerfully informs the foundations of the international system[26]: Sovereignty has not been "dethroned"[27] yet – as current political tendencies to fall back on ideas of far-reaching sovereignty and non-interference illustrate.

Coming to the topic at issue, even a modern conception of sovereignty that accepts some *internal* human rights constraints to sovereignty could reject the idea that it is also abridged by *individual* rights of *outsiders*: In order to serve its function as a protector of goods, a guarantor of well-being, autonomy and security of its population, a state must have certain privileges. Among them, so it might be claimed, is the privilege to be free from direct duties to individual non-members. Foreign states do not bear any human rights duties to them – and international law should not put them under such. If any duties to outside persons exist at all, these are not generated by their individual rights but are a consequence of duties to other states. In treaty law, states could then *consent* to assume obligations to individuals abroad, but these are fully voluntary and supererogatory undertakings, which they are (morally) allowed to withdraw at any moment. States are also *permitted* to *de facto* contribute to human rights enjoyment abroad (as long as this does not infringe other states' sovereignty), but there are neither pre-legal nor direct and consent-independent obligations to do so.[28]

Thus, even conceptions of sovereignty that accept material limits to *domestic* sovereignty could provide a starting point for arguments against *extraterritorial* human rights duties. They are grounded on the nationalist worry of a fundamental conflict

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25 Philpott (Fn. 23), chap. 3; Matthias Mahlmann, *Konkrete Gerechtigkeit*, 4th edn, 2019, 81 ff.; Kaufmann (Fn. 23), 17 f. This is mirrored in the evolution of the "Responsibility to Protect" (R2P) principle, which suggests that disregard for human rights internally results in a partial loss of external sovereignty rights, allowing others to intervene. While R2P is not yet a generally recognized binding norm, the existence of the debate highlights the change of perspective from sovereignty as a right to sovereignty as a responsibility.

26 The *Charter of the United Nations* emphasizes the sovereign equality of states (Art. 2(1)), prohibits attacks on independence and integrity (Art. 2(4)) and interventions in the *domain réservé,* the areas "essentially within the domestic jurisdiction" (Art. 2(7)). For an overview, Samantha Besson, Sovereignty, in: *MPEPIL* (Fn. 3), 2011, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472> [accessed 31.1.2018], §§ 89, 95 ff.

27 Eyal Benvenisti, Sovereigns as Trustees of Humanity, *AJIL* 107 (2013), 295–333, 296.

28 Such a view might e. g. be derived from Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, 1983, 47 ff., or Thomas Nagel, The Problem of Global Justice, *Phil. & Pub. Aff.* 33 (2005), 113–147, who both grant only highly limited principles of aid to outside strangers. To illustrate, a similar view of *constitutional* rights inspired the US Supreme Court when it held that "the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory", *United States v. Verdugo-Urquidez*, 494 U. S. 259 (1990), 266.

between universal human rights and (popular) sovereignty: Sovereignty ultimately intends to protect the sovereign's members. As a result, constraints from individual rights are only acceptable if they benefit those who make up the sovereign. The position thereby defended is that sovereignty can only be safeguarded by domesticating human rights.[29]

Objecting to the Sovereignty Objection

Is accepting *some* human rights-based limits to sovereignty compatible with maintaining that these limits only apply to a part of states' actions, namely those with effects on territory, but not to others, namely those that affect people abroad? Foundational normative considerations suggest otherwise.

First, human rights are not only *limits* to sovereignty. *Judicially*, sovereignty is not a pre-legal, self-standing principle on which international law is based. It is the other way round: It is constructed, ascribed, conditioned and organized by international law, as it was e. g. confirmed by the German Constitutional Court.[30] Sovereignty is not about being free from *any* authority. It is compatible with being subjected to international law – and today, the latter is a legal system which acknowledges individuals as direct legal subjects and of which human rights form an essential part.

Normatively, given that *some* individual-rights-based limits to sovereignty are accepted (namely those stemming from rights of insiders), it must also be accepted that the general value of sovereignty is of an instrumental nature: It is not assigned to states for its own sake but to enable them to protect individual goods. It is not only other states' sovereignty but also *individuals' sovereignty* that constrains states – expressed in fundamental human rights that secure basic prerogatives of the individual's ability to realize goods, fulfil interests and satisfy needs in the first place.[31] Importantly, these human rights do not just *curtail* but rather *determine* the legitimate scope of state sovereignty: Human rights are not mere conflicting considerations to be weighed against it. Rather, they define and lend value to sovereignty in the first place, implying a presumption in favor of human rights from the outset.[32]

But if sovereignty is based on human rights, it is inconsistent to use it as exactly the opposite, namely as a bulwark against human rights obligations[33] – *even if the latter orig-*

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29 Cf. discussion in Cristina Lafont, Sovereignty and the International Protection of Human Rights, *Journal of Political Philosophy* 24 (2016), 427–445, 431.

30 BVerfG, Judgment of the Second Senate of 30 June 2009–2 BvE 2/08 – §§ 1–421, 223; see also Besson (Fn. 26), § 109; Peters (Fn. 23).

31 Mahlmann (Fn. 25), 80 ff.

32 Peters (Fn. 23), 514, 544.

33 Margot E. Salomon, *Global Responsibility for Human Rights*, 2007, 26; cf. Sigrun I. Skogly, Global Responsibility for Human Rights, *OJLS* 29 (2009), 827–847, 839 f.

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inate abroad. If it is used as such, its foundation collapses. If one proposes a territorial human rights regime, one still proposes a *human rights* regime. By embarking on the idea behind *human* rights, one cannot deny that they are by their very nature held qua *being human* thus qua something that all human beings universally share and that applies to all of them equally.[34] If human rigths are accepted as constraints, so it seems, then the burden of proof is with those who maintain that these constraints do not pertain to expressions of sovereignty the effects of which happen to materialize beyond a state's borders.

Second, the concept of sovereignty must be defined with regard to the nature of the entities it is ascribed to, namely (for present purposes) states. The moral status of states is not self-standing: They are essentially collective institutions the purpose of which is the realization of individual and common goods. Further, states are entitled to means of authority to which no other agent is: They are authorized to coerce and sanction people, to take their property in order to fund collective institutions and enable redistribution, to design education systems, or to use (military) force for self-defense. States can frame and impact individuals' lives like, arguably, no other agent can. In addition, states are agents with enormous factual power at their disposal, like infrastructure, police, armies, in addition to vast amounts of other financial, technological, personal and natural resources. Given this distinctive nature, the idea behind human rights obligations of states is motivated by the recognition that states' entitlements cannot be unlimited, that individuals have to be protected from their use and potential abuse of power. Basic human interests must be defended by special means against this powerful agent – and human rights amount to such a mean. It is under these premises that principles that pertain to states, such as sovereignty, are ascribed and determined. That they generate a permission to disregard basic rights – *whoever's* basic rights – does not appear in line with what states are here for in the first place.

What does this all mean for the problem of *extraterritoriality*? If universality is a feature of human rights, it should also apply in determining the scope of addressees of obligations.[35] The question is not only whether *rights* apply to *outsiders*, but also whether a *state* (that is morally and legally bound by certain norms and, moreover, has voluntarily consented to them) may allow its agents and institutions to *disobey these principles,* depending on where the effects of their conduct take shape. Human rights are grounded on the very nature of human beings, while human rights obligations apply to the state by virtue of the distinctive nature of this collective agent: Statehood is not

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34 Plausibly, one cannot deny that these rights are grounded on *something* all human beings share. This is not only one of the "vague and often misleading gestures to the universality of human rights", Samantha Besson, The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To, *LJIL* 25 (2012), 857–884, 858. A justificatory theory of extraterritorial human rights obligations needs to be based on a theory of what this *something* consists in, but this goes beyond the scope of the present paper.

35 Skogly (Fn. 33), 833 f.

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a necessary but a sufficient condition for being subject to them. States are the agents which mean the most serious threat to human rights enjoyment and, at the same time, they are those best equipped for protecting human rights. If such obligations apply *by virtue of* the state's nature, then they apply to all of its conduct, regardless of where its effects are felt.[36] Human rights obligations constrain states, because states are the way they are, and human rights are intended for what they are intended. Consequently, they constrain all of their conduct, legal or illegal, executive, legislative, administrative or judicative, actions as well as omissions,[37] on territory as well as abroad: If people shall generally be protected from this extraordinary power with its huge potential of abuse, then border-transcending relations between individuals and third states should also be structured accordingly. As domestic violations are of international concern and *contradict* sovereignty (which is the very idea behind modern IHRL), extraterritorial violations cannot be *protected* by the sovereignty principle:[38] In Anne Peters' words, "no state can claim that its state sovereignty forbids cross-border concern for humanity: to make a sovereign claim is to declare oneself open to inspection in that regard".[39] Otherwise, this would leave a significant protection vacuum.

Importantly, this last point is reinforced by the aspect that outsiders are usually not able to impact the decision-making process that governs state conduct. In order to be assured that third states' conduct is not beyond law and morality, they are reliant on other protective instruments – most importantly, on human rights guarantees. These can function as a substitute that provides minimal protection for outsiders in their relations to third states, in which they lack (democratic) instruments typically available to insiders.[40]

Summing up, the idea that sovereignty is *internally* limited by rights of individuals but *externally* only by rights of other states is normatively not convincing[41] – plus, it does neither correspond to contemporary international law, which accepts individuals as direct legal subjects, nor to global reality, in which states have countless security measures at their disposal through which they can impact people abroad.

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36 As statehood is not a *necessary* condition for being a human-rights duty-bearer, this claim does neither commit one to exclude moral and/or legal human rights obligations of *non-state actors*.

37 The question on how far positive extraterritorial obligations go is intensely discussed but beyond the scope of this article. Plausibly, at least states' acts and omissions with direct, foreseeable and significant effects on human rights enjoyment of individuals should be covered, see Yuval Shany, Taking Universality Seriously: A functional approach to Extraterritoriality in Human Rights Law, *LEHR* 7 (2013), 47–71, 69.

38 Sigrun I. Skogly / Mark Gibney, Transnational Human Rights Obligations, *HumRtsQ* 24 (2002), 781–798, 798.

39 Peters (Fn. 23), 543.

40 Similarly Allen Buchanan, Why International Legal Human Rights?, in: *Philosophical Foundations of Human Rights*, ed. by Rowan Cruft / S. Matthew Liao / Massimo Renzo, 2015, 244–262, 256. Lafont importantly objects that not only *democratic* states exhibit such flaws, Lafont (Fn. 29), 43 f.

41 Moreover, the objection would implicitly assume that *not* being under duties to individual non-members is compatible with *not* violating other states' sovereignty. Yet, when UK state agents violate human rights of Iraqi residents, e. g. by contributing to torture, it is doubtful whether this is in compliance with respect for Iraq's sovereignty.

4 Coming Back to Legal Implementation

Linking the interpretation of legal norms to a philosophical normative background theory is of paramount importance in the domain of human rights, given their conceptualization and the intention behind them. In the question at issue, it can contribute to the development of coherent, well-informed principles in interpreting the applicability threshold *jurisdiction*.

The theoretical conception that should underlie jurisdiction is a widely debated issue. In the position as developed here, it is neither *effective overall control* (as the ECtHR suggests) nor the exercise of *normative authority* (i. e. authority that exhibits a reason-generating dimension that calls for compliance and is exercised with a claim to legitimacy, as some authors propose[42]) that subjects states to human rights obligations. With respect to human rights, not only those subject to effective control or normative authority but *everyone* is a stakeholder. Next to their unique ability to exercise normative authority, states are also agents with enormous *de facto* power and it is also by virtue of *this* dimension that they can gravely impact individuals' lives. As a result, everyone *affected* by state conduct shall be safeguarded by this minimally protective instrument that human rights offer.[43] This is one of the crucial intentions behind *internationalizing* human rights law: Human rights are a means to protect those affected from state conduct in light of the fact that they do not have the instruments typically available to those who are more substantially subjected and who often are, in addition, protected by domestic fundamental rights guarantees. From that perspective, the element of some form of (territorial) normative authority, such as a checkpoint,[44] might be an *indication* but not a *necessary condition* for jurisdiction. This is most relevant in the field of modern security measures: If states affect people without exercising any form of normative authority (which is often the case e. g. when it comes to extraterritorial surveillance that is commanded on their own territory), they are still bound to human rights. States cannot, by acting as mere *de facto* powers, establish a human-rights-free zone.

An important objection to such a view points to prudential considerations that call for constraining at least *legal* obligations to territory: While agreeing with the overall goal of realizing universal human rights enjoyment, one might argue that a territorial distribution of duties would most effectively and efficiently realize this goal – in light of the unenforceability of extraterritorial duties, the difficulty of allocating them to multiple duty-bearers, the limited foreseeability of effects abroad and the complexity of causal chains, the fragmentation of responsibility, the risk of overload for both

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42 Besson (Fn. 34), 860 ff., 864 f., 873 f.; similarly Duttwiler (Fn. 16), 157 ff.

43 See also David Cole, Rights over Borders, *Cato Supreme Court Review* (2008), 47–61, 60, who underlines that democratic procedures alone do not yet guarantee respect for human rights.

44 ECtHR, *Jaloud v. the Netherlands* (Fn. 19), § 152.

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courts and states as well as the danger of self-interested interventions under the guise of human rights.

A discussion of these points goes beyond the scope of this paper, but one general consideration shall be alluded to: The assumption of universal rights and obligations is perfectly compatible with maintaining that such norms are in need of contemporary, context-specific implementation and that particular challenges states face, such as the one of extraterritoriality, can legitimately be considered in determining legal accountability in concrete cases.[45] Yet, while such extraterritorial duties are demanding, stringent and inconvenient, it is also true that they apply to states as institutions, which are precisely intended for meeting stringent demands.

Moreover, such prudential concerns are necessarily contingent, depending on political, social, economic and technological circumstances. In today's world, with the many extraterritorial instruments it offers, it is unlikely that generally allowing states to disregard human rights beyond borders will provide the most effective protection system. Thus, mere practical reasons do not suffice for justifying a systematic exclusion of duties to those abroad. Accepting the extraterritorial reach of IHRL amounts to a contemporary requirement, too.

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5 Conclusion

It is not denied that states, territorial associations and sovereignty continue to be of relevance. What must be denied is that they allow states to *fully disregard* non-members' claims *in the area of human rights*. At least for this actor (state) on this level (institutional) and within this field (human rights), such principles do not curtail obligations. The territorial paradigm, often portrayed as reflecting both commonsense morality and *opinio iuris*, is in tension with why we have human rights in the first place.

In the context of security, theoretically informed reinterpretation of the applicability trigger jurisdiction must aim at reinforcing the capability of IHRL to meet threats that contemporary security measures mean to human rights – at home or abroad. States must be bound by human rights even if they do not exert any territorial but only factual or virtual control.[46] There are no human-rights-free zones when it comes to state conduct that affects human beings. Acknowledging the legitimacy

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45 Cf. e. g. S. Matthew Liao, Human Rights as Fundamental Conditions for a Good Life, in: Cruft/Liao/Renzo (Fn. 40), 79–100, 95 ff.; Carl Wellman, *The Moral Dimensions of Human Rights*, 2011.

46 On virtual control, e. g. Francesca Bignami / Giorgio Resta, Human Rights Extraterritoriality: The Right to Privacy and National Security Surveillance, *GWU Law School Public Law Research Paper* 67 (2017), <http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2562&context=faculty_publications> [accessed 3.10.2017], 5.

of extraterritorial human rights obligations is not taken to be the solution to all security-related problems or to amount to a thorough account of global justice. But it is one of the many necessary roads that need to be taken, not least in light of the global status quo.

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